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No. 01-435

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

—v.—

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

JACK E. ROBINSON
Attorney for Petitioner
Clearwater House
2187 Atlantic Street
Stamford, Connecticut 06902
(203) 425-4500

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This petition is the culmination of a hotly contested business divorce between the petitioner and the respondents which has resulted in seven years of hard-fought litigation. The case began by the respondents dismissing *with prejudice*-in a prior Massachusetts state court action the exact same claims subsequently filed against petitioner in the present New York federal court action. (Pet. at 2).

Having failed to receive the benefit of a dismissal with prejudice, petitioner was then forced to undergo several years of oppressive litigation waged by the respondents in a brazen money grab, wherein they manipulated the ambiguous language in a contract drafted by *their own attorney* to lay claim for themselves to petitioner's Omega stock which petitioner had always owned in his own name and for his own benefit.

At trial, the district court (sitting as the trier of fact) refused to draw an adverse inference that if the draftsman/respondents' attorney had testified, he would have explained that respondents' reading of the contract was incorrect and that petitioner's reading was correct. Instead, the district court engaged in unfounded speculation as to the parties' contractual intent (Pet. at 12a-19a) for the purpose of itself filling gaping holes in the respondents' case culminating in an erroneous ruling against petitioner.[1]

This is a textbook case for the application of the Missing Witness Rule. For this reason, as well as to determine both the applicability of the rule in the federal

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[1] The district court relied on a "compromise" theory (Pet. at 16a) in support of its ruling that petitioner willingly gave up his Omega shares, notwithstanding the total lack of evidence to support such a finding. This is a key reason why hearing the testimony of the contract draftsman was crucial.

courts and the definition of its contours, the petition should be granted.

I.

CERTIORARI IS NECESSARY TO DETERMINE WHETHER THE "MISSING WITNESS RULE" HAS A PLACE IN THE FEDERAL COURTS.

Respondents argue that the Missing Witness Rule "has no place in the federal courts." (Resp. Br. at 11). They base this contention on dicta issued by the Fifth and Eleventh Circuits. However, since only *this* Court can make such a determination, the petition should be granted.

In *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044 (5th Cir.), *rhrg denied*, 917 F.2d 559 (5th Cir. 1990), the Fifth Circuit referred to the Missing Witness Rule as "an anachronism" and opined that "there is no justification for perpetuating the [rule] in civil cases." *Id.* at 1048. However, even though it was explicitly invited by the panel to rehear *Herbert* en banc,[2] the Fifth Circuit declined to do so. Thus, it is unclear whether the Fifth Circuit as a whole would agree that the rule lacks applicability.

The Eleventh Circuit also questioned the rule's "application under the Federal Rules of Evidence." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659 n. 4 (11th Cir. 1988). Both *Herbert* and *Jones* are in direct opposition to authorities cited by petitioner (Pet. at 7-8) demonstrating the rule's continued vitality in other circuits.

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[2] "As a panel, therefore, we do not undertake to overrule the cases that rely on the rule, but merely call its archaism to the attention of the Court for possible consideration en banc." *Id.* at 1049.

Notwithstanding dicta issued by the Fifth and Eleventh Circuits, only this Court can determine—with finality—the applicability of the Missing Witness Rule and define the rule's contours. "This Court has supervisory power over the federal courts, and [it] may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (Rehnquist, C.J.).

Unless and until this Court rules on the applicability of the Missing Witness Rule in the federal courts, and whether the rule is governed by federal or state law,[3] there will continue to be uncertainty and conflicting decisions on the subject throughout the circuits. *See* Pet. at 7.

II.

IF THE MISSING WITNESS RULE IS DEEMED TO BE APPLICABLE IN THE FEDERAL COURTS, THIS COURT SHOULD DEFINE THE RULE'S CONTOURS.

If this Court deems that the Missing Witness Rule is applicable in the federal courts, the contours of the rule should be defined because "[t]he rule by its terms provides a great deal of latitude in determining whether an adverse inference is warranted under a given set of circumstances." Alan Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine That Party's Attorney—Modern Cases*, 78 A.L.R.4th 571, 575 (1990). The need for the

[3] Petitioner contends that the rule is governed by state law (Pet. at 8-9), whereas respondents argue that federal law governs. (Resp. Br. at 10-11). That the issue has never been decided by this Court warrants the granting of certiorari.

Court's guidance in this area is particularly compelling given the unique circumstances of the present case—*i.e.*, the missing witness was the opposing parties' attorney who drafted the disputed and ambiguous contract.

Respondents argue that a *per se* rule regarding the "legal unavailability" of a witness should not be adopted. (Resp. Br. at 12). However, given the level of confusion and number of conflicting decisions throughout the lower courts on this issue, a *per se* rule or similar pronouncement by this Court would, under the circumstances, facilitate the uniform administration of the laws in the federal courts.

Since "[w]hether a witness is equally available depends not solely on physical availability or accessibility, but on all the facts and circumstances bearing on the relationship of the witness to the parties," *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 275 (2nd Cir. 1996), this Court should not hesitate to hold that if the missing witness is (or was at relevant times) the opposing party's attorney—and all of the other requirements for the Missing Witness Rule are met—the witness is by definition "legally unavailable" to the party seeking the inference.[4]

Such a ruling with respect to a missing attorney witness is particularly appropriate since it is likely that "the client would have called the attorney to testify, except that the client either knew or feared that counsel's testimony would have been unfavorable." Stephens, Annotation, 78 A.L.R.4th at 579. Moreover, in light of the attorney-client privilege, attorney work product doctrine, and ethical rules regarding client confidentiality, an attorney witness for one party can safely be deemed

[4] In this case, the missing witness had also been sued previously by the petitioner on this very matter, thereby making him even more "legally unavailable."

"unavailable" *per se* to the opposing party for purposes of the Missing Witness Rule.

III.

PETITIONER ESTABLISHED AT TRIAL ENTITLEMENT TO A MISSING WITNESS INFERENCE.

Respondents mischaracterize the "notice" requirement under New York law for obtaining a missing witness charge. *See* Resp. Br. at 7-8. "The New York Court of Appeals has stated that a request for jury instructions is timely if made before the jury begins its deliberations." *Rice v. Hoke*, 846 F.2d 160, 164 (2nd Cir. 1988). Since the present case was a bench trial, petitioner satisfied his "notice" requirement by notifying the trial court prior to the court's deliberations that petitioner sought a missing witness inference. (Pet. at 17a).

Respondents also mischaracterize the New York Missing Witness Rule generally. (Resp. Br. at 7). The New York Court of Appeals has stated that:

> The burden, in the first instance, is upon the party seeking the charge to promptly notify the court that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call him to testify . . . Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for

> the witness' absence or otherwise demonstrate that the charge would not be appropriate.

People v. Gonzalez, 68 N.Y.2d 424, 427-28, 502 N.E.2d 583, 509 N.Y.S.2d 796 (1986). Thus, after petitioner met his burden of demonstrating entitlement to an adverse inference, the burden shifted to respondents who failed to meet their burden.

Furthermore, contrary to respondents' argument (Resp. Br. at 8-9), there can be no doubt whatsoever that Attorney Herbert—had he been called as a witness—would have provided uniquely relevant and non-cumulative testimony regarding the parties' overall intent regarding the disputed provisions of the contract. In fact, as the contract's draftsman, Attorney Herbert could have elucidated the disputed language that the district court found was ambiguous and "subject to more than one interpretation." (Pet. at 2). Clearly, it would have been preferable for the district court to hear the understanding of the contract's draftsman, particularly because it was faced with contradictory testimony from the parties.

Under these circumstances, the court should have inferred that Herbert's testimony would have been unfavorable to the respondents since they failed to call him as a witness.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Dated: Stamford, Connecticut
December 6, 2001

Respectfully submitted,

JACK E. ROBINSON
Attorney for Petitioner
Clearwater House
2187 Atlantic Street
Stamford, Connecticut 06902
(203) 425-4500